APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 27418

HERMAN TELFAIR,

Plaintiff-Appellant,

versus

ZIM ISRAEL NAVIGATION COMPANY, LIMITED,
Defendant-Third-Party Plaintiff-Appellee,

versus

LUCKENBACH STEAMSHIP COMPANY,

Third-Party Defendant-Appellee.

Appeals from the United States District Court for the Middle District of Florida

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(July 22, 1970)

ON PETITIONS FOR REHEARING
Before WISDOM, GEWIN, and AINSWORTH
Circuit Judges

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby Denied.

APPENDIX "B"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 27418

HERMAN TELFAIR,

Plaintiff-Appellant,

versus

ZIM ISRAEL NAVAGATION COMPANY, LIMITED,

Defendant-Third-Party Plaintiff-Appellee,

versus

LUCKENBACH STEAMSHIP COMPANY,

Third-Party Defendant-Appellee.

Appeals from the United States District Court for the Middle District of Florida

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(June 19, 1970)

Before WISDOM, GEWIN, and AINSWORTH
Circuit Judges

WISDOM, Circuit Judge: *Seas Shipping Company v. Sieracki*, 1946, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099, extended the warranty of seaworthiness to longshoremen. *Ryan Stevedoring Company v. Pan Atlantic S.S. Corporation*, 1956, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133, shifetd the liability to the stevedore when it breaches the warranty of workmanlike service. In this longshoreman (Telfair) — shipowner (Zim Israel) — stevedore (Luckenbach) case, Telfair complains of the court's granting a new trial which resulted in a much lower verdict than the verdict in his first trial. We re-

view, first, the district court's decision to grant a new trial because it had originally withheld from the jury the shipowner's defense of contributory negligence and, second, its conclusion that the stevedore breached its warranty of workmanlike service. We affirm the district court's judgment.

I

On May 4, 1966, Herman Telfair, "header" (foreman) of a longshoreman gang, slipped on a ladder while descending into the hold of the Mazal, a ship owned by Zim Israel Navagation Company, Limited. The injury required first a cartilege removal and then, because of arthritis coupled with the torn meniscus and operation, a knee joint fusion or arthodesis, permanently disabling Telfair from work as a longshoreman. The screws in his knee and joint-stiffening produced chronic back problems which eventually will cause disc problems.

In December 1966, Telfair sued Zim Israel in a Florida state court for negligence and unseaworthiness, alleging that he had slipped on grease on an access ladder. Zim Israel removed the case to federal district court and filed a third party complaint against the stevedore company, Luckenbach Steamship, for indemnity. Both Zim Israel and Luckenbach argued that Telfair had been contributorily negligent.

At the close of all the evidence, the district court granted Telfair's motion for a directed verdict on the issue of contributory negligence. The jury found that Zim Israel was not negligent, but awarded Telfair $133,385 for the Mazal's unseaworthiness. The district court entered judgment March 27, 1968. Two months later, the court granted Zim Israel's motion for a new trial (timely filed), finding "that there was sufficient evidence to have permitted the jury to consider the issue of the contributory negligence of the plaintiff".

At the second trial, the jury awarded Telfair $50,000. The district court denied Telfair's motion for a new

trial. The court also entered judgment in favor of Zim Israel and against Luckenbach on the third-party claim. Telfair and Luckenbach appealed.

II

> The precedent is longstanding in this Court that A motion for new trial is addressed to the trial judge's discretion. He may grant a new trial if he thinks he has committed an error; . . . The exercise of his discretion is not ordinarily reviewable on appeal, though a failure to exercise discretion, or an abuse of it, may be corrected.

Marsh v. Illinois Central Railroad Compnay, 5 Cir. 1949, 175 F.2d 498, 500; see *Stewart v. Texas & Pacific Railway Company,* 5 Cir. 1960, 278 F.2d 676, 678. Indeed, "[i]n few, if any, situations is the discretion of a trial judge broader than in granting a new trial". *Willitt v. Purvis,* 5 Cir. 1960, 276 F.2d 129, 132. Here the district court initially removed the issue of contributory negligence from the jury, believing there was no evidence on which to submit it. Prompted by Zim Israel's motion, however, the district court upon further consideration concluded that he should have allowed that issue to go to the jury. Consequently, he granted the motion for a new trial.

In diversity cases, the question whether sufficient evidence is presented to send a case to the jury is controlled by federal standards in this Circuit. *Boeing Company v. Shipman,* 5 Cir. 1969, 411 F.2d 365, 368-70. *Boeing* directs that a "mere scintilla of evidence" will not prevent a directed verdict, but "if there is substantial evidence opposed to the motions", "in the light and with all reasonable inferences most favorable to the party opposed to the motion", then the issue should properly be submitted to the jury. Here, Beam, the first longshoreman to descend the ladder "slipped a little bit" but did not fall. Telfair, had he been watching, could have seen him slip as did one of the other long-

shoremen. Telfair was not watching, however, because he climbed onto the ladder while the first longshoreman was still descending. The seven men who followed Telfair also descended without incident. Testimony shows that Telfair warned them of his accident. But several other individuals used the ladder that afternoon without warning. Although the ladder had not been cleaned, they suffered no mishap. We do not say that contributory negligence was a strong defense. We decide only whether the district court abused its discretion in granting a new trial because it had granted a directed verdict on contributory negligence. We conclude that there was no abuse of discretion.

III

The district court deferred decision on the indemnity claim until the conclusion of the second trial. The court then held that Luckenbach had breached its warranty of workmanlike service and thus prompted the Mazal's unseaworthiness. Among other things, the district court specifically found that the first longshoreman to descend the ladder slipped but did not fall, noticed grease on his shoe and on the ladder, yet wrongfully failed to warn Telfair. Luckenbach, in its brief, "agrees that if Beam, the first longshoreman to descend the ladder, actually saw grease on the ladder and had sufficient time to warn Telfair, who was immediately behind him, but failed to do so, there would be an adequate basis under applicable law to hold the stevedore liable for indemnity to the shipowner." But Luckenbach attempts to persuade us to reject the district court's credibility determinations in this "shifting, conflicting, and obviously unreliable testimony". *Id.*

There is no doubt that Beam's story varied from deposition to first trial to second trial. But we are unable to say that the district court accepted the wrong version. And Beam's inability to keep the story straight need not require the conclusion that all versions were

erroneous. In short, regardless of our views of the evidence, "[w]e do not retry the case. We may determine only whether the findings pass muster under the clearly erroneous concept of F.R. Civ. P.52(a), 28 U.S.C.A." *Smith v. United States*, 5 Cir. 1961, 287 F.2d 299, 301.

> It is well settled that in order for a reviewing court to set aside findings of fact by a trial court sitting without a jury, it must be clearly demonstrated that such findings are without adequate evidentiary support in the record, or were induced by an erroneous view of the law, and the burden of showing that the findings are clearly erroneous is on the one attacking them.

Chaney v. City of Galveston, 5 Cir. 1966, 368 F.2d 774, 776. Although Luckenbach has perhaps come closer than most, it has not met that burden.

We AFFIRM the judgment of the district court.

APPENDIX "C"

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

No. 66-465-Civ. T.

HERMAN TELFAIR

Plaintiff,

vs.

ZIM ISRAEL NAVAGATION COMPANY, LIMITED,
a foreign corpooration,

Defendant and Third Party Plaintiff

vs.

LUCKENBACH STEAMSHIP COMANY,
a corporation,

Third Party Defendant.

FINAL JUDGMENT

AND NOW, this 26th day of February, 1969, in accordance with the Court's Findings of Fact and Conclusions of Law, it is

ORDERED and ADJUDGED, that the Third Party Plaintiff, Zim Israel Navigation Company, Ltd., recover of the Third Party Defendant, Luckenbach Steamship Company, indemnity in the amount recovered by the plaintiff, Herman Telfair, from the defendant and third party plaintiff, Zim Israel Navigation Company, Ltd., and the reasonable attorneys' fees and costs of defense of Telfair's action by Zim Israel Navigation Company, with the legal rate of interest as provided by law, and its costs of action.

If the third party plaintiff and the third party defendant cannot agree upon the attorney's fees and defense costs which the third party plaintiff is entitled to recover from the third party defendant by way of indemnity, the Court will make further findings of fact and a supplemental judgment upon motion by either party.

DONE and ORDERED at Tampa, Florida, this 26th day of February, 1969.

JOSEPH P. LIEB
United States District Judge

APPENDIX "D"

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

No. 66-465-Civ. T.

HERMAN TELFAIR

Plaintiff,

vs.

ZIM ISRAEL NAVAGATION COMPANY, LIMITED,
a foreign corpooration,

Defendant and Third Party Plaintiff

vs.

LUCKENBACH STEAMSHIP COMANY,
a corporation,

Third Party Defendant.

O R D E R

THIS CAUSE came on for consideration upon the filing by the Third party Defendant of a Motion to Amend the Court's Findings of Fact and Conclusions of Law, to Have Judgment Set Aside and Entered for Third Party Defendant, Luckenbach Steamship Company, Inc., in Accordance With Third Party Defendant's Motion for a Directed erdict or, in the Alternative, Motion for a New Trial. The Defendant and Third Party Plaintiff also filed a Motion for Order Fixing Shipowner's Attorneys' Fee For Defense of Telfair's Claim.

The Court has heard the argument of counsel, studied the memoranda filed by the parties in support of their respective positions, examined the memoranda and time sheets submitted by the Defendant and Third Party Plaintiff in support of its motion, and is otherwise fully advised in the premises. It is therefore, upon consideration,

ORDERED, ADJUDGED and DECREED:

1. That the Third Party Defendant's Motion to Amend the Court's Findings of Fact and Conclusions of Law, to Have Judgment Set Aside and Entered for Third Party Defendant, Luckenbach Steamship Company, Inc., in Accordance With Third Party Defendant's Motion for a Directed Verdict or, in the Alternative, Motion for New Trial be, and it is hereby DENIED.

2. That the Defendant and Third Party Plaintiff's Motion for Order Fixing Shipowner's Attorneys' Fee for Defense of Telfair's Claim be, and it is hereby, GRANTED.

3. That the shipowner's attorney for the defense of Telfair's claim be, and it is hereby, fixed in the sum of Twenty Thousand ($20,000.00) Dollars.

DONE and ORDERED at Tampa, Florida, this 9th day of April, 1969.

JOSEPH P. LIEB
United States District Judge

APPENDIX "E"

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
No. 66-465-Civ. T.

HERMAN TELFAIR
Plaintiff,
vs.
ZIM ISRAEL NAVAGATION COMPANY, LIMITED,
a foreign corpooration,
Defendant and Third Party Plaintiff
vs.
LUCKENBACH STEAMSHIP COMANY,
a corporation,
Third Party Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case arises out of an injury sustained by longshoreman Herman Telfair upon the Motor Vessel MAZAL, in Tampa, Florida, on May 4, 1966. Telfair was employed by the third party defendant, stevedore Luckenbach Steamship Company, as the foreman or "header" of a gang of longshoremen. Telfairs gang was assigned the duty of discharging cargo from the vessel's No. 4 cargo hold. As Telfair was descending the ladder from No. 4 upper 'tween deck to No. 4 lower 'tween deck he lost his footing when his foot slipped on one of the rungs of the ladder; both his feet slipped from the ladder rungs and his right knee struck some part of the ladder causing injuries which resulted ultimately in a surgical fusion of his knee.

Telfair brought suit against Zim Israel Navigation Company, Limited, the owner of the vessel, and Zim Israel Navigation Company impleaded Luckenbach

Steamship Company, the stevedore, seeking indemnification from Luckenbach for any amount Telfair might be entitled to recover from Zim Israel plus defense costs.

Telfair's case against Zim Israel Navigation Company was tried to a jury in March 1968 with trial of Zim Israel's indemnification case against Luckenbach deferred, at that time, with the consent of the parties and the concurrence of the Court. The jury found in favor of Zim Israel Navigation Company on teh negligence count of Telfair's complaint and against Zim Israel Navigation on Telfair's unseaworthiness count, and returned a verdict against the shipowner and in favor of Telfair in the amount of $133,385.00.

Thereafter, upon the motion of Zim Israel, a new trial was granted and in October 1968 Telfair's case against Zim Israel was again tried. As at the first trial, the jury found in favor of Zim Israel Navigation Company and against Telfair on Telfair's negligence count, and in favor of Telfair and against Zim Israel on Telfair's unseaworthiness count. The second trial resulted in a judgment in favor of Telfair and against Zim Israel in the amount of $50,000. Also at the October trial, the Third party Complaint of Zim Israel against Luckenbach was tried by the Court.

The case was tried on October 15, 16, 17, 18, 21 and 22, 1968, upon portions of six depositions and the testimony of some thirteen witnesses who appeared in person at the trial.

Having considered all of the evidence adduced at the trial, and after considering the memorandum arguments of counsel for Zim Israel and Luckenbach, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On May 4, 1966, the M/V MAZAL was owned and operated by Zim Israel Navigation Company, Limited.

2. Telfair, the plaintiff, was employed on that date by Luckenbach Steamship Company as a longshoreman, assigned to work in the No. 4 hold of the MAZAL as the "header" or foreman of a gang of longshoremen employed by Luckenbach to discharge cargo.

3. Luckenbach Steamship Company was performing the stevedoring services on the MAZAL pursuant to an oral contract in accordance with a written rate schedule.

4. Telfair was injured shortly after 1:00 P.M. on May 4, 1966. After boarding about 1:00 P.M., he and his gang spotted the cargo boom for discharging, then went into the upper 'tween deck and moved certain hatch beams to clear the way for discharging and had started to go into the lower 'tween deck when the accident occurred. The accident resulting in his injuries occurred on the ladder at the forward end of No. 4 hold of the MAZAL between the upper 'tween deck and lower 'tween deck levels.

5. Telfair was the second man in his gang to descend the ladder upon which the accident occurred. The first man to use the ladder, longshoreman Robert Beam, also employed by Luckenbach, slipped but did not fall as he descended the ladder. After Beam slipped and before Telfair started down the ladder, Beam noted grease on his shoe. Befor Telfair slipped, Beam saw grease on the ladder. Beam did not warn of Telfair of the presence of grease on the ladder before Telfair slipped and fell.

6. Telfair, as well as Luckenbach's Pier Superintendent Melvin Cowles, testified that under the circumstances, Beam should have warned those coming

after him of the presence of grease on the ladder. The Court finds that Beam should have warned Telfair of the presence of grease on the ladder and that Beam's failure to give a warning was a failure on Beam's part to perform in a workmanlike manner.

7. Telfair was the employee of Luckenbach, who, on the day of the accident, was charged with the responsibility of making an inspection in the area in which his gang was to work and this responsibility included that of ascertaining that there was sufficient light in the work area and the places the longshoremen had to go through to get to the work aera, that the ladders were safe for use and whether there was anything out of order or wrong in connection with access routes to the working area. The Court finds that Telfair did not discharge this responsibility in a workmanlike manner in that, although it was "sort of dark" in the area in which the ladder was, Telfair did not request additional lighting of any kind. Telfair made no attempt to check visually the condition of the ladder before he started down, looking at it only to be sure that he did not step on Beam, the man who had gone down the ladder ahead of him.

8. There was testimony, and the Court finds, that the grease on the ladder was visible to one standing on the upper 'tween deck near the top of the ladder where Telfair was standing before he started to descend. Therefore the Court further finds that the ladder was visibly unsafe and that Luckenbach, the stevedore, had a duty to prohibit use of the ladder while it was in such a condition, under the Safety and Health Regulations for Longshoring.

9. Telfair testified that as he descended the ladder his gaze was directed upward. The Court finds that in failing to look where he was going, Telfair failed to use reasonable care for his safety. The Court accepts the testimony of Moshe Hami, who was the chief mate

of the MAZAL on the date of the accident, Pier Superintendent Cowles, and Luckenbach's Ship Stevedore Foreman Lucas, and finds that one in the exercise of reasonable care looks down when descending a ladder so as to see where he is going and what he is about to put his feet upon.

10. The Court finds that Longeshoreman George White, who was also employed by Luckenbach, was standing, with Telfair, at the head of the ladder as Beam went down, that White saw Beam when Beam slipped, but gave no warning to Telfair, who was to be the next man down the ladder, that Beam had slipped. The Court finds, as Telfair testified, that in keeping with good practice, George White should have warned Telfair and the other men about to use the ladder when he saw Beam slip.

11. Mr. Lucas, the Stevedore's ship foreman, and the person in Luckenbach's organization immediately above Telfair and the other headers in the chain of command, testified, and the Court finds, that there was no procedure at Luckenbach on the day of the accident whereby Mr. Lucas or anyone at his direction checked the ladders before the longshoremen were allowed to use them, and that there was not a procedure established by Luckenbach for checking the ladders for visible defects prior to use. The Court further finds that there was no inspection on behalf of Luckenbach, cursory or otherwise, of the ladder and the work area, before the longshoremen were sent into the hold to commence discharging. In view of the testimony of the longshoremen, particularly Elwood Favors, the Court finds that a cursory inspection would have disclosed the presence of grease on the ladder had such an inspection been made. The Court further finds that the failure to make a cursory inspection constituted a failure on the part of Luckenbach to perform stevedoring services in a workmanlike manner.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the subject matter of this action and of the parties.

2. Luckenbach Steamship Company breached its warranty of workmanlike service with respect to the stevedoring operations upon the MAZAL on the day on which Telfair was injured, in that Beam failed to off, after Beam had slipped in it and noticed it, before Telfair descended the ladder; in that Telfair himself warn Telfair of the grease on the ladder, or to clean it failed to exercise reasonable care for his own safety in directing his gaze upward as he descended the ladder and failing to look where he was going and see what there was to be seen; in that longshoreman George White failed to warn Telfair after he had seen Beam slip before Telfair started down the ladder; and in that Luckenbach did not cause even a cursory inspection of the ladder to be made before it was used by the longshoremen. The unseaworthiness of the MAZAL was brought into play by the breaches of warranty just mentioned.

3. Zim Israel Navigation Company, the ship owner, is entitled to be indemnified by Luckenbach Steamship Company, the stevedore, in the amount Telfair, the longshoreman plaintiff, recovers from Zim Israel Navigation Company plus attorneys' fees and the expenses of litigation in defending Telfair's suit. *Crumady v. The Joachim Hendric Fisser,* 358 U.S. 423, 428-429 (1959).

4. Defects which are observed cannot be overlooked. *Southern Stevedoring & Contracting Co. v Hellenic Lines, Ltd.,* 338 F.2d 267, 270-271 (5th Cir. 1968). The knowledge of Beam, a longshoreman employee of the stevedore, was notice to the stevedore. The actual knowledge need not be that of a supervisory employee. *T. Smith & Son, Inc. vs. Skibs A/S Hassel,* 362 F. 2d 745, 747 (5th Cir. 1966).

5. A stevedore has a duty to make a reasonable inspection of equipment supplied by a ship owner before using it. *Southern Stevedoring & Contracting Co. vs. Hellenic Lines, Ltd., supra.* The failure of Luckenbach to prohibit the use of the fixed ladder by its employees when it was visibly unsafe was a breach of Section 9.25 of the Safety and Health Regulations for Longshoring. Use of the ladder when it was visibly unsafe constituted a breach of the warranty of workmanlike service, c.f. *Ray vs. Compania Naviera Continental, S.A.*, 203 F. Supp 206, 210 (D. Md. 1962). The Safety and Health Regulations codify good industry practice. D/S *Ove Skou vs. Hebert,* 365 F.2d 341, 348 (5th Cir. 1966).

6. The negligence of Telfair himself, described above, also constituted a breach of the stevedore's warranty of workmanlike service. *United States Lines vs. Williams,* 365 F.2d 332 (5th Cir. 1966); *D/S Ove Skou vs. Hebert, supra,* at 350.

7. This is a case in which the stevedore was the party best situated to adopt preventive measures and reduce the likelihood of injury, by requiring a reasonable inspection prior to use of the ladder, and a case in which the principle enunciated in *Italia Societa vs. Oregon Stevedoring Company,* 376 U.S. 315 (1964) is applicable.

8. The stevedore may not assume that a safe condition exists when he has notice that such may not be the case. *Southern Stevedoring & Contracting Co. vs. Hellenic Lines, Ltd., supra,* at 271.

9. The defect in the ladder which produced Telfair's injuries, and which rendered the MAZAL unseaworthy as the jury has found, was not a latent one. It was simply grease on the ladder which was there to be seen and which was seen by a number of Luckenbach's employees. It should have been seen by Telfair had he but looked.

DONE and ORDERED at Tamp a, Florida, this 26th day of February, 1969.

JOSEPH P. LIEB
United States District Judge